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No.

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a Dade Wrecker Service,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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QUESTIONS PRESENTED

Whether the impoundment of a vehicle following the arrest of the operator without affording the operator any opportunity to make alternative arrangements for its removal violates the reasonableness requirement of the Fourth Amendment when there exists a County ordinance that expressly provides that prior to impoundment the vehicle operator must be afforded a reasonable opportunity in light of the circumstances to make alternative arrangements for the removal.

Whether procedural due process is violated when officials, acting under color of state law, cause a vehicle to be seized pursuant to a County ordinance and held pursuant to a State lien statute, neither of which provides any means to contest the lawfulness of the impoundment other than by filing an action for damages in small claims court.

LIST OF ALL PARTIES

All parties are listed in the caption.

NOTICE PURSUANT TO 28 U.S.C. § 2403(b)

Since the constitutionality of § 713.78, Fla. Stat. (1987) is being called into question 28 U.S.C. § 2403(b) may be applicable. Three copies of the petition for certiorari are being served upon the attorney general of the State of Florida:

ROBERT A. BUTTERWORTH
Attorney General
The Capitol
Tallahassee, FL 32399-1050

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

The Petitioners, MAGNUM TOWING, INC., and RENALDO HERNANDEZ, by and through their undersigned attorney, petition for a writ of certiorari to review the judgment of the Third District Court of Appeal of Florida in this case.

OPINIONS BELOW

The Third District Court of Appeal of Florida affirmed without opinion the Final Summary Judgment of

the Circuit Court of Dade County, Florida. There are no reported opinions in this case.

JURISDICTION

On December 26, 1989 the Third District Court of Appeal of Florida entered its judgment, affirming, without opinion, the Final Summary Judgment of the Circuit Court of Dade County. The petitioners did not file any petition for rehearing or en banc review. The Supreme Court of Florida has no jurisdiction to review the judgment of the Third District. Art. V, § 3, Fla. Const. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities, secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

§ 713.78, Fla. Stat. (1987) is set forth in its entirety in Appendix "I"

Dade County Code § 30-384 is set forth in its entirety in Appendix "H"

Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against **unreasonable** searches and **seizures**, shall not be violated and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment:

This case involves the first section of the Fourteenth Amendment to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On March 10, 1987 OFFICER DEL MAZO of the Metro-Dade Police Department arrested the petitioner, RENALDO HERNANDEZ, for the offenses of obstructing an officer and disorderly conduct. Subsequent to arresting HERNANDEZ, OFFICER DEL MAZO asked HERNANDEZ to sign a waiver or release form which would relieve the officer from liability in the event that the vehicle operated by the arrested person is left on the

scene. When HERNANDEZ refused to sign the release OFFICER DEL MAZO made arrangements to have the tow truck operated by HERNANDEZ and owned by MAGNUM TOWING, INC. (MAGNUM) removed. That prior to ordering the tow truck removed OFFICER DEL MAZO never afforded HERNANDEZ any opportunity to have someone from MAGNUM come to the scene in order to remove the tow truck. The officer's actions failed to comply with the standardized procedures for the impoundment of vehicles following an arrest. Dade County Code § 30-384(6) provides that prior to impoundment the vehicle operator must be afforded "a reasonable opportunity in light of the circumstances in which to provide for the removal of the vehicle within a reasonable length of time."

HERNANDEZ and the arresting officer had radios in their vehicles which could have been used to call MAGNUM in order to advise them to send someone out to take charge of the tow truck which was lawfully situated on the private parking lot of an apartment building.

Defendant DOLLAR ENTERPRISES, INC., (DOLLAR), in response to OFFICER DEL MAZO's request that the vehicle be removed, appeared on the scene. DOLLAR, acting pursuant to the direction and control of OFFICER DEL MAZO, as well as pursuant to the terms of a written contract entered into between DOLLAR and DADE COUNTY, removed the petitioners' tow truck from the parking lot of the apartment building to its impound lot.

Prior to the removal of the tow truck an owner/manager of MAGNUM arrived on the scene and offered to pay to have the vehicle released. The respondents

refused since the vehicle had already been hooked up to the DOLLAR tow truck in preparation for towing.

Subsequent to the impoundment the petitioners demanded the return of the tow truck. DOLLAR refused to release the vehicle unless all towing and accrued storage charges were paid in full.

The petitioners filed a § 1983 action in the Circuit Court of Dade County seeking damages and declaratory relief. Complaint, Appendix "C". The petitioners expressly asked the trial court to declare that: the seizure of the tow truck was in violation of the Fourth Amendment; and that § 713.78, Fla. Stat. (1987) (towing lien statute) as well as Dade County Code § 30-384 (impoundment of vehicles) failed to afford procedural due process, guaranteed by the Fourteenth Amendment, due to their failure to provide any means to obtain a prompt postdeprivation hearing. *Id.*

The petitioners also filed an action in County Court in order to post cash bond for the full amount of accrued towing and storage fees in order to secure the release of the tow truck. The cost of the cash bond was $189.00. Filing fees and service of process in County Court (small claims), amounted to another $23.25.

Subsequently, all parties filed motions for summary judgment. The petitioners' motion for summary judgment asked the court to determine: that the seizure of the tow truck was in violation of the Fourth Amendment; and that, under the circumstances of this case, the plaintiffs were deprived of their property without due process of law in that neither the County ordinance nor the State

lien statute provided any meaningful opportunity to contest the lawfulness of the impoundment. See Motion for Partial Summary Judgment, Appendix "D", and Accompanying Affidavits, Appendices "E", "F", and "G".

After reviewing the respective motions for summary judgment the trial court granted summary judgment for the respondents, finding that the petitioners' Fourth and Fourteenth Amendment rights were not violated. See Final Summary Judgment, Appendix "B". Subsequently, the petitioners appealed to the Third District Court of Appeal. The Third District affirmed the findings of the trial court without opinion. See Appendix "A". Pursuant to Art. V, § 3, Fla. Const. the action of the Third District Court of Appeal in affirming the decision of the trial court without decision rendered the judgment final for all purposes.

REASONS FOR GRANTING THE WRIT

A. FOURTH AMENDMENT VIOLATION

There exists an irreconcilable conflict between the holding in this case and prior Supreme Court decisions wherein this Court found that police acted reasonably when they acted in conformity with routine procedures which "circumscribe[d] the discretion of individual officers" despite the existence of less intrusive alternatives. *Colorado v. Bertine*, 479 U.S. 367, 376 n.7 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983).

The Fourth Amendment issues arising out of the impoundment of vehicles following the arrest of the driver have generated numerous appellate and Supreme

Court decisions. *See, e.g., State v. Wells*, 539 So.2d 464 (Fla. 1989), *cert. granted*, ___ U.S. ___, 109 S.Ct. 3183 (1989); *see also State v. Perry*, 324 S.E.2d 354, 359 (W.Va. 1984) (collecting cases).

Both the trial court and the appellate court in this case were obviously under the impression that *Bertine* has eliminated altogether the requirement that an arrested driver be offered an alternative to impoundment. *State v. Smith*, 529 So.2d 1226 (Fla. 3d DCA 1988) (*Bertine* obviates the requirement that police offer an alternative to impoundment).

This Court has not fully addressed the issue raised in this case, to-wit: the effect of a County ordinance which mandates that prior to impoundment the vehicle operator must be afforded "a reasonable opportunity in light of the circumstances in which to provide for the removal of the vehicle within a reasonable length of time."

Absent regulations to the contrary, police are not compelled to provide an alternative to impoundment. However, the Fourth Amendment still requires that the decision to impound be reasonable in light of the circumstances. The decision in *Bertine* has caused confusion over whether an "alternative to impoundment" must be offered when police are not following standardized criteria. In this regard there exists a conflict between this case and those cases which recognize that the decision to impound is controlled by the standard of reasonableness under the Fourth Amendment. *United States v. Kornegay*, 885 F.2d 713, 716 (10th Cir. 1989) (collecting cases).

B. FOURTEENTH AMENDMENT

The Fourteenth Amendment issues raised by the petitioners are substantial. Every year countless vehicles are towed and impounded by the police. The private interest in the uninterrupted use of an automobile or truck is substantial. A person's ability to make a living and have access to both the necessities and amenities of life may depend upon the availability of such a vehicle when needed. A suit for redress is not an adequate substitute for a prompt postdeprivation hearing. The decision in this case is contrary to the generally recognized principle that an opportunity for a prompt postdeprivation hearing to contest the seizure must be afforded within a reasonable time (48 hours) following the impoundment, and prior to requiring the payment of any fees. *Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977); *DeFranks v. Mayor and City Council of Ocean City*, 777 F.2d 185 (4th Cir. 1985); *Breath v. Cronvich*, 729 F.2d 1006 (5th Cir. 1984); *Cokinos v. District of Columbia*, 728 F.2d 502 (D.C. Cir. 1983); *Valdez v. City of Ottawa*, 434 N.E.2d 1192 (Ill. App. 1982). *See also, United States v. Von Neumann*, 474 U.S. 242 (1986) (availability of a timely postseizure hearing fulfills the requirements of due process).

ARGUMENT

I. THE SEIZURE OF PETITIONERS' VEHICLE WAS MADE WITHOUT LAWFUL AUTHORITY IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION AND IS ACTIONABLE UNDER § 1983

Recently, this Court in *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), in holding that a

routine impoundment of a vehicle under **standardized procedures** is **reasonable** under the Fourth Amendment, despite the availability of a less intrusive alternative disposition, hastened to point out that

> Nothing in Opperman or Lafayette prohibits the exercise of police discretion **so long as that discretion is exercised according to standard criteria** and on the basis of something other than suspicion of evidence of criminal activity. Here the discretion afforded to the Boulder police was exercised in light of **standardized criteria**, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. (Emphasis supplied).

Id. 479 U.S., at 375-376, 107 S.Ct., at 743.

The holding in *Bertine* that the Fourth Amendment does not require police, when following routine procedures, to offer an arrested driver an alternative to impoundment, is of no help in resolving the issue in this case. This is so due to the fact that Dade County Code § 30-384 requires the police to afford the driver a reasonable opportunity to make alternative arrangements prior to impounding a vehicle following the arrest of the driver. The ordinance provides in relevant part that police may impound a vehicle:

> (6) When the **driver of such vehicle is taken into custody** by a law enforcement officer and such vehicle would thereby be left unattended upon a **street**; provided, however, that the officer shall, prior to impounding a vehicle, **afford the owner** or the driver at his or her option, a **reasonable opportunity** in light of the circumstances in which to **provide for the removal** of the vehicle

> within a reasonable length of time. In lieu of impounding the vehicle in cases where neither the driver nor the owner elects to provide for the removal of the vehicle or in cases where neither the driver nor the owner can provide for the removal of the vehicle within a reasonable time, the owner or the driver may elect in writing to allow the vehicle to remain in place, if lawful. Neither the individual officer nor the officer's employer shall be held liable for any damage whatsoever to a vehicle when the owner of said vehicle or the driver has elected to allow the vehicle not to be moved.
>
> Prior to impounding such vehicle pursuant to this subsection, the police officer shall reasonably attempt to inform the owner or the driver of said vehicle of the various alternatives to impounding, and, the officer, upon request, shall provide the owner or the driver with the requisite form upon which he or she may elect to allow the vehicle to remain in place.
>
> For purposes of the subsection, the driver of the vehicle shall be conclusively presumed to be the authorized agent of the owner.

In *Bertine* this Court recognized that if regulations governing the impoundment of vehicles are enacted the police must abide by them. In this case the officer ignored the established procedures.

It is readily apparent from reviewing the Dade County ordinance that OFFICER DEL MAZO was acting outside the scope of his authority for three reasons when he caused petitioners' vehicle to be towed. First, a private parking lot is not a **street**. Second, no offer was ever made, nor was the tow truck driver permitted to use his

mobile radio, to call the dispatcher at MAGNUM in order to make arrangements for the removal of the tow truck. Third, when a manager from MAGNUM appeared on the scene respondents refused to release the vehicle, which was hooked up to a DOLLAR tow truck in preparation for towing. *See Collins v. State*, 630 S.W. 890 (Tx App. 1982) (removal of vehicle after owner appeared on scene unreasonable). It is the petitioners' contention that the respondents' conduct was unreasonable and a violation of the Fourth Amendment.

II. A SUIT FOR DAMAGES IS NOT AN ADEQUATE SUBSTITUTE FOR A PROMPT POSTDEPRIVATION HEARING

A. The Availability Or Non-Availability Of A State Tort Remedy Does Not Affect The Right To Pursue A § 1983 Action Based On A Violation Of Procedural Due Process Where, As Here, The Deprivation Occurred As The Result Of An Established State Policy – Namely – Dade County Ordinance 30-384 & § 713.78 Fla. Stat. Or When The County or State Does Not Provide A Meaningful Postdeprivation Remedy.

The Supreme Court in *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), held that the availability of an adequate postdeprivation remedy would constitute a bar to bringing an action under § 1983 since due process does not mandate a predeprivation hearing in a case where the deprivation of property was the result of a "random, unauthorized act". Where, as here, the deprivation occurred as the result of an established state and county policy (Dade Code § 30.384 & § 713.78, Fla.

Stat.), the availability of the postdeprivation state remedy does not bar the availability of a § 1983 action. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982); *Zinermon v. Burch*, Case No. 87-1965 (opinion filed Feb. 27, 1990).

> Parratt would be on point if all plaintiff sought would be compensation for the damage done to his car during the towing. 'The majority opinion in Parratt concentrates on problems inherent in turning federal courts into forums for dealing with common law torts that are the regular business of state courts.' Wakinekona v. Olin, 664 F.2d 708 (9th Cir. 1981). However, in the instant case plaintiff challenges the procedures of the City of Costa Mesa, not a negligent or intentional deprivation of property. . . .

Soffer v. City of Costa Mesa, 607 F. Supp. 975, 978 (C.D. Calif. 1985), *aff'd* in part 798 F.2d 361 (1986). *See also Hudson v. Palmer*, 468 U.S. 517, 534, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) ("In *Logan*, we decided a question about which our decision in *Parratt* left little doubt, that is, whether a postdeprivation state remedy satisfies due process where the property deprivation is effected pursuant to an established state procedure. We held that it does not.").

B. Petitioners Were Entitled To A Hearing To Determine The Legality Of The Tow Within A Reasonable Time Following The Seizure.

Petitioners agree, for the purposes of this lawsuit, that the respondents had no duty to provide the

petitioners with a hearing prior to the seizure of the tow truck. *Weinrauch v. Park City*, 751 F.2d 357, 360 (10th Cir. 1984); *Soffer v. City of Costa Mesa*, 798 F.2d 361, 363 (9th Cir. 1986); *Sutton v. City of Milwaukee*, 672 F.2d 644, 645-47 (7th Cir. 1982); *Cokinos v. District of Columbia*, 728 F.2d 502, 502-503 (D.C. Cir. 1983).

However:

> When a car is towed or impounded, some form of fair and impartial hearing at which an owner is provided an opportunity to challenge the lawfulness of removing his car and assessing charges against him must be provided within a reasonable time. Huemmer v. Mayor & City Council of Ocean City, 632 F.2d 371, 372 (4th Cir. 1980). Stypmann v. City and County of San Francisco, 557 F.2d 1338, 1343-44 (9th Cir. 1977); Craig v. Carson, 49 F.Supp. 385, 395 (M.D. Fla. 1978).

Breath v. Cronvich, 729 F.2d 1006, 1011 (5th Cir. 1984). This follows from the fact that "[s]ince a person's car is property, the state may not deprive him of it without due process of law . . . . " *Sutton v. City of Milwaukee*, 672 F.2d at 645; *Hale v. Tyree*, 491 F. Supp. 622, 625 (E.D. Tenn. 1979). Constitutional due process requires an opportunity for a hearing before the state may deprive a person of his property, absent exceptional circumstances. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965); *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S.Ct. 780, 786, 28 L.Ed.2d 113 (1970); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 179, 94 S.Ct. 1633, 1656, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("While these cases [discussing the due process requirements] indicate that the particular interests involved

might not have demanded a hearing immediately, they reaffirm the principle that property may not be taken without a hearing at some time."). A temporary, non-final deprivation of property, such as exists in this case, is nevertheless a deprivation. *Fuentes, supra,* 407 U.S., at 84-85, 86, 92 S.Ct., at 1996, 1197.

C. The Florida Lien Statute, § 713.78, Makes No Provision For A Hearing – The Vehicle Owner Must, At His Own Expense, Initiate A Lawsuit To Determine The Legality Of The Tow.

> If an auto is towed without prior notice to the owner, due process requires prompt notice and opportunity to a hearing before the government makes any disposition of the vehicle. Additionally, the owner must have an opportunity to contest the seizure and tow **before he can be required to pay any charges or fees.** Seizure of property without prior hearing has been sustained only where the owner is afforded prompt post-seizure hearing at which the person seizing the property must at least make a showing of probable cause. (Emphasis supplied).

Valdez v. City of Ottawa, 434 N.E.2d 1192, 1196 (Ill. App. 1982).

The Florida statute in question does not satisfy the fundamental requirement of due process that a person deprived of his property be afforded an opportunity to be **heard at a meaningful time and in a meaningful manner.** *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976). In all of the reported cases in which the courts have upheld the adequacy of the post-deprivation hearing, there was either a statute mandating a hearing within 48 hours of the towing or some other

means afforded to challenge the validity of the towing within a relatively short period of time. Florida's § 713.78 provides neither. *See, e.g., Goichman v. Rheuban Motors, Inc.*, 682 F.2d 320 (9th Cir. 1982) (Ninth Circuit upheld constitutionality of statute that provided for a post-seizure hearing within forty-eight hours of request); *Stypmann v. City and County of San Francisco*, 557 F.2d 1338, 1344 (9th Cir. 1977) (five-day wait for hearing too long for indigents – seizure of property without hearing sustained only where owner afforded prompt post-seizure hearing "at which the person seizing the property must at least show probable cause"); *Soffer v. City of Costa Mesa*, 607 F. Supp. 975, 983 (D.C. Cal. 1985), *aff'd* in part 798 F.2d 361 (9th Cir. 1986). *See also Weinrauch v. Park City*, 751 F.2d 357 (10th Cir. 1984) (City provided hearing on Tuesdays and Thursdays as well as informal hearing on demand); *Cokinos v. District of Columbia*, 728 F.2d 1983 (D.C. Cir. 1983) (post-towing hearing was available during normal working hours within 16 hours from time cars were towed). *See also Frier v. City of Vandalia, Ill.*, 770 F.2d 699, 709 (7th Cir. 1987) (Swygert, S.J., concurring) ("I would hold, then, that notice of towing, the availability of an expedited State tort suit that can make the petitioner whole, and the ability to reclaim the towed cars immediately at a cost of $10.00 together constitute adequate postdeprivation process . . . . "); *Huemmer v. Mayor and City Council of Ocean City*, 474 F. Supp. 704 (D. Md. 1979).[1]

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[1] Following the decisions in *Stypmann* and *Goichman* California amended its motor vehicle code. "California Vehicle Code § 22852 provides that notice of the right to a post-towing hearing be given within forty-eight hours after a vehicle has

(Continued on following page)

Given the fact that the Florida statute in question does not provide for any prompt hearing whatsoever it is fair to conclude that it does not satisfy the requirement of due process for a prompt hearing. The petitioners contend that the "procedural safeguards," which consist of a suit for redress in small claims court, are too bounded by procedural constraints to satisfy the requirements of procedural due process. *See Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 19-22, 98 S.Ct. 1554, 1565-55, 56 L.Ed.2d

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been towed, and that such a hearing be held within forty-eight hours after a request for a hearing is made." *Scofield v. City of Hillsborough*, 862 F.2d 759, 764 (9th Cir. 1988). Following the decision in *Huemmer v. Mayor and City Council of Ocean City*, 474 F. Supp. 704 (D. Md. 1979) a revised ordinance was enacted:

> it added a provision requiring written notice to the owner of the vehicle, within one working day of the tow, of his entitlement to a hearing on the question of legality of the seizure, the hearing to be had within twenty-four hours after a request for it. Thus, the mayor and city council of Ocean City undertook to supply the deficiency that the district court and we had pointed out in the earlier ordinance.

De Franks v. Mayor and City Council of Ocean City, 777 F.2d 185, 187 (4th Cir. 1985). *See also, Goichman v. City of Aspen*, 590 F. Supp. 1170, 1172 (D. Col. 1984) (due process is satisfied by ordinance which provides that: notice of impoundment shall be mailed within 48 hours; that owner has ten days from impoundment to file written demand for hearing, at which hearing sole issue considered is whether there was probable cause to impound vehicle; that hearing must be held within 48 hours after written demand; and that the city bears burden of proof at hearing).

30 (1978) (utility customers' ability to challenge termination of service in state courts does not provide due process since that remedy is too "bounded" by procedural constraints and potential for delay); *Evans v. City of Chicago*, 689 F.2d 1286, 1298-99 (7th Cir. 1982) (post-deprivation legal remedy may appear at some point to be too "lengthy and speculative" to provide due process).

In declaring the predecessor of § 713.78 unconstitutional [§ 85.031(3), Fla. Stat.(1977)] the district court in *Hann v. Carson*, 462 F. Supp. 854, 868 (M.D. Fla. 1978) aptly pointed out that:

> 'Apart from bringing an independent lawsuit, like the present one, . . . an individual has no opportunity to contest the legal consequences of the state statute. The Supreme Court, however, has emphatically rejected the notion that available, common law remedies, for injunctive and compensatory relief, are "an adequate substitute" for an accurate administrative remedy.' Memphis Light, Gas & Water Div. v. Craft, 436 U.S. at 20, 98 S.Ct. at 1566, 56 L.Ed.2d at 45-46.

After noting that judicial remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit, the district court went on to conclude that § 85.031(3) was unconstitutional

> Because of the state statute's 'failure to provide notice reasonably calculated to apprise' motor vehicle owners of the availability of procedures to consider their claims that their vehicles are wrongfully and erroneously being withheld; and because of the state statute's 'failure to afford [motor vehicle owners] an opportunity to present' their disputes and to have errors rectified, the statute deprives motor vehicle owners

> of their 'interest in property without due process of law.' Id. 436 U.S. at 22, 98 S.Ct. at 1567, 56 L.Ed.2d at 46-47.

See also, Craig v. Carson, 449 F. Supp. 385 (M.D. Fla. 1978).

In 1978 the legislature enacted § 713.78, Fla. Stat., which in turn added the provision whereby a vehicle owner wishing to contest the lawfulness of the seizure could file a civil tort action against the agency responsible for the removal of the vehicle. However, the new statute, which did nothing to assure either a prompt administrative, or court, postdeprivation hearing, failed to rectify the deficiencies noted by the district court.

Even if a vehicle owner followed the procedures adopted by the County to supply the requisite hearing (§ 713.78, Fla. Stat.) and filed suit he would not get a prompt hearing. At best, an aggrieved party would have to wait at least 40 days for a trial on the merits – even under the rules governing small claims (under $2,500). Fla. R. Summ. P. 7.010 *et seq.* Failure to file suit or to pay all accrued towing and storage fees will result in the forfeiture of the vehicle which will be auctioned off to satisfy the unpaid bill. § 713.78(4)(b), Fla. Stat. (1987).

Unlike the situation in *Parratt* and *Hudson* the respondents are in a position to provide a meaningful postdeprivation hearing to determine the legality of the seizure. This case is analogous to the situations existing in *Fuentes* and *Mitchell*. In those cases the Court found that before property may be seized a predeprivation hearing or, in certain circumstances, an opportunity for a prompt postdeprivation hearing must be afforded in order to satisfy due process.

D. The Supreme Court Cases Addressing The Issue Of Attachment And Due Process Support The Petitioners' Arguments That They Are Entitled To A Prompt Postdeprivation Hearing.

Justice Powell, in his concurring opinion in *Mitchell v. W.T. Grant Company*, 416 U.S. 600, 625-26, 94 S.Ct. 1895, 1909, 40 L.Ed.2d 406 (1974) pointed out that "[a]n opportunity for an adversary hearing must be accorded promptly after the sequestration to determine the merits of the controversy, with the burden of proof on the creditor." He went on to point out that in *Fuentes* the Supreme Court found the Florida replevin statute unconstitutional due to the fact that "the Florida statute provided only that a post-seizure hearing be held eventually on the merits of the competing claims, and it **required the debtor to initiate that proceeding.**" *Id.* In finding the Louisiana prejudgment attachment constitutional the Supreme Court interpreted the statutory provision providing that the debtor by contradictory motion may obtain the dissolution of the writ of attachment as allowing for an immediate hearing to determine whether the writ was wrongfully issued. *Id.* at 622, 94 S.Ct. at 1907.

The Court in *Mitchell* went on to point out that:

> The writ is obtainable on the creditor's *ex parte* application, without notice to the debtor or opportunity for a hearing, but the statute entitles the debtor immediately to seek dissolution of the writ, which must be ordered unless the creditor 'proves the grounds upon which the writ was issued, Art. 3506, the existence of the debt, lien, and delinquency, failing which the court may order return of the property and assess damages in favor of the debtor, including attorney's fees.'

. . . .

> The seller was required to put up a bond to guarantee the buyer against damage or expense, including attorney's fees, in the event the sequestration is shown to be mistaken or otherwise improvident. The buyer is permitted to regain possession by putting up his own bond to protect the seller.

. . . .

> Finally, the debtor may immediately have a full hearing on the matter of possession following the execution of the writ, thus cutting to a bare minimum the time of creditor – or court – supervised possession.

Id. at 406-408, 94 S.Ct. at 1899-1900.

In discussing the defects in the Florida replevin statute, which came before the Court in *Fuentes*, the Court in *Mitchell* aptly pointed out that:

> Those statutes permitted the secured installment seller to repossess the goods sold, without notice or hearing and without judicial order of supervision, but with the help of the sheriff operating under a writ issued by the court clerk at the behest of the seller. Because carried out without notice or opportunity for hearing and without judicial participation, this kind of seizure was held violative of the Due Process Clause.

. . . .

> the Court also said that under the statute the defendant-buyer would 'eventually' have an opportunity for a hearing, 'as the defendant in the trial of the court action for repossession . . . .' Id., at 75, 92 S.Ct., at 1991. The Pennsylvania law was considered to be essentially the same as that

> of Florida except that it did 'not require that there *ever* **be opportunity for a hearing** on the merits of the conflicting claims to possession of the replevied property.' Id., at 77, 92 S.Ct., at 1992. **The party seeking the writ was not obliged to initiate a court action for possession,** was not required formally to allege that he was entitled to the property and had only to file an affidavit of the value of the property sought to be replevied. (Emphasis in original) (Bold added).

Id. at 415-16, 94 S.Ct. at 1904. The Court concluded, in upholding the Louisiana sequestration before the Court, that:

> Under Louisiana procedure, however, the debtor, Mitchell, was not left in limbo to await a hearing that might not 'eventually' occur, as the debtors were under the statutory schemes before the Court in Fuentes. Louisiana law expressly provides for an immediate hearing and dissolution of the writ 'unless the plaintiff proves the grounds upon which the writ was issued.' Art. 3506.

Id. at 618, 94 S.Ct. at 1905.

Two readily apparent common threads run through all of the Supreme Court decisions outlined above. **First,** a debtor must be given the **opportunity to challenge the seizure in a prompt manner. Second,** his **financial interest must be protected** in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment.

In situations such as this, wherein the provision of predeprivation procedural safeguards is impracticable or

infeasible, due process requires that a meaningful post-deprivation hearing, prior to a suit for redress, be provided.

> Such a hearing still provides an opportunity to correct wrongful deprivations before much harm is suffered; furthermore, a prompt deprivation hearing respects the need for summary action since the necessary seizure is allowed before the hearing.
>
> * * * *
>
> Taken together, these recent cases support several generalizations. Each case has required that some kind of hearing *prior* to a subsequent suit for redress be available.

Note, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 University of Chicago Law Review 594, 600-602 (1977).

This is so because:

> If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented. At a later hearing, an individual's possessions can be returned to him if they were unfairly or mistakenly taken in the first place. Damages may even be awarded to him for the wrongful deprivation. But no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred. 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' Stanley v. Illinois, 405 U.S. 645, 647, 92 S.Ct. 1208, 1210, 31 L.Ed.2d 551.

Fuentes v. Shevin, 407 U.S. 67, 81-82, 92 S.Ct. 1983, 1994-95, 32 L.Ed.2d 556 (1972).

Under Florida's lien statute there is no provision for any immediate hearing. When a vehicle is wrongfully seized and impounded the owner is truly left in "limbo." His only recourse is to file a lawsuit. Even if he does prevail he cannot be made whole since the lien statute does not provide for attorney's fees and there is doubt as to whether any award for damages due to loss of income can be recovered in cases such as this, wherein a commercial vehicle is involved.

The vehicle owner can post a bond to secure the release of his vehicle. However, as a condition precedent to doing so he must file an action in the County Court. Regardless,

> When officials of Florida . . . seize one piece of property from a person's **possession** and then agree to return it if he surrenders another, they deprive him of property whether or not he has the funds, the knowledge, and the time needed to take advantage of the recovery provision. The Fourteenth Amendment draws no bright lines around three-day, 10-day or 50-day deprivations of property. Any significant taking by the State is within the purview of the Due Process Clause.

Fuentes v. Shevin, 407 U.S. 67, 85-86, 92 S.Ct. 1983, 1997-98, 32 L.Ed.2d 556 (1972).

Requiring the vehicle owner to file suit and post bond as a condition precedent to the immediate return of the vehicle not only wrongfully shifts the burden of seeing to it that a final hearing is eventually held, but also has the effect of making the aggrieved party the plaintiff, thereby wrongfully shifting the burden of proof. This is wrong for it should be up to the respondents to prove

that the petitioners' vehicle was lawfully seized; for unless the vehicle was lawfully seized no lien rights accrue. *Stypmann v. City and County of San Francisco*, 557 F.2d at 1343 n. 18; *see, e.g., Hartford Ins. Co. v. Overland Body Tow, Inc.*, 11 Kan. App.2d 373, 724 P.2d 687 (Kan. App. 1986); *Boss v. City of Spokane*, 387 P.2d 67 (Wash. 1963); *T.R. LTD. v. Lee*, 55 Md. App. 629 465 A.2d 1186, *cert. den.* 470 A.2d 353 (1983).

When a vehicle is seized without a warrant, court order, or affidavit attesting to the reason justifying the seizure and impoundment there is much more reason to be concerned about the danger "that the seizure will be mistaken." *Mitchell*, 416 U.S. at 418, 94 S.Ct. at 1905. The Dade County Code, which authorized the seizure, as well as the State statute, which creates a lien on the seized vehicle, do not provide adequate procedural due process. They fail to provide the vehicle owner with an opportunity to contest the lawfulness of the seizure by means of a meaningful postdeprivation hearing.

SUMMARY

Only in a few and limited situations has this Court allowed outright seizure without opportunity for a prior hearing. **First,** in each case, the seizure has been directly necessary to secure an important governmental or general public interest. **Second,** there has been a special need for very prompt action. **Third,** the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, **under the standards of a narrowly drawn statute** [Dade County Code § 30-384], that it was

necessary and justified in the particular instance. (Emphasis supplied).

Fuentes, at 90-91, 92 S.Ct. at 1999-2000.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. JASINSKI
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March, 1990.

APPENDIX A

IN THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, 1989

MAGNUM TOWING, INC., and RENALDO HERNANDEZ,	**	
Appellants,	**	CASE
vs.	**	NO. 89-608
METROPOLITAN DADE COUNTY, OFFICER OSCAR DEL MAZO and DOLLAR ENTERPRISES, INC.,	**	
Appellees.	**	

Opinion filed December 26, 1989.

An Appeal from the Circuit Court of Dade County, Leonard Rivkind, Judge.

Robert M. Jasinski, for appellants.

Robert A. Ginsburg, Dade County Attorney, and James Allan, Assistant County Attorney and Jay W. Williams, Assistant County Attorney, for appellees Dade County and Officer Oscar Del Mazo; Fine Jacobson Schwartz Nash Block & England and Andrew L. Salvage, for appellee Dollar Enterprises, Inc.

Before COPE, LEVY and GERSTEN, JJ.

PER CURIAM.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT
OF THE 11TH JUDICIAL
CIRCUIT IN AND FOR
DADE COUNTY,
FLORIDA
GENERAL JURISDICTION
DIVISION

CASE NO. 87-11503 CA 15

MAGNUM TOWING, INC.,
and RENALDO HERNANDEZ,

Plaintiffs,

vs.

DADE COUNTY, OFFICER
OSCAR DEL MAZO and
DOLLAR ENTERPRISES, INC.,
etc.,

Defendants.

_____/

FINAL
SUMMARY
JUDGMENT

THIS MATTER came before the Court pursuant to concurrent summary judgment motions filed by all Plaintiffs and all Defendants on January 30, 1989. The Court, having reviewed the pleadings, depositions, affidavits, answers to interrogatories, admissions, and memoranda of counsel, and having been otherwise duly advised in the premises, hereby makes the following findings:

1. Defendants' actions did not violate the Fourth or the Fourteenth Amendments to the United States Constitution, did not violate any provisions of the Florida Constitution, did not violate any existing statutes or

ordinances, and provided no basis for any liability on the part of Defendants to Plaintiffs.

2. Plaintiffs have not proved or established any basis for finding Section 713.78 of the Florida Statutes unconstitutional.

3. Plaintiffs have not proved or established any basis for finding Section 30-384 of the Code of Metropolitan Dade County unconstitutional.

4. Defendants have no liability to Plaintiffs under either 42 U.S.C. § 1983 or Section 715.07 of the Florida Statutes.

Accordingly, it is ORDERED and ADJUDGED that Plaintiffs, MAGNUM TOWING, INC. and RENALDO HERNANADEZ take nothing by this action and that Defendants, DADE COUNTY, OFFICER OSCAR DEL MAZO, and DOLLAR ENTERPRISES, INC. be granted final summary judgment as to all issues and go hence without day. This Court retains jurisdiction to entertain a motion by Defendants for costs and appropriate attorney's fees. Judgment is entered accordingly.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 2 day of March 1989.

LEONARD RIVKIND
CIRCUIT COURT JUDGE

Copies furnished to:

Jay W. Williams, Esquire
Robert Jasinski, Esquire
Andrew Salvage, Esquire
Denis Dean, Esquire

APPENDIX C

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA

MAGNUM TOWING, INC. and RENALDO HERNANDEZ, Plaintiffs, v. DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a/ Dade Wrecker Service, Defendants.	GENERAL JURISDICTION DIVISION Case No. 87-11503 (15) FLA. BAR #156481 FIRST AMENDED COMPLAINT

JURISDICTION

1. This action is brought pursuant to 42 U.S.C. §§ 1983 and 1988 and the First, Fourth and Fourteenth Amendments to the U.S. Constitution as well as Fla. Stat. §§ 713.78, 715.07, 86.011 Dade County Code § 30-384, and Article I §§ 9 and 12 of the Florida Constitution.

2. The amount in controversy, exclusive of interest and costs, exceeds the sum of $5,000.00.

PARTIES

3. The plaintiff, Magnum Towing, Inc., is a Florida corporation having its principal place of business in Dade County, Florida.

4. The plaintiff, Renaldo Hernandez, is sui juris and is a resident of Dade County, Florida.

5. The defendant, Dade County, is a political subdivision of the State of Florida.

6. The defendant, Oscar Del Mazo, is a police officer with the Metro-Dade Police Department. He is sued in his individual capacity.

7. Defendant, Dollar Enterprises, Inc., d/b/a Dade Wrecker Service, is a Florida corporation whose principal place of business is Dade County, Florida.

CAUSE OF ACTION

8. That on the 10th day of March, 1987 defendant Officer Oscar Del Mazo, acting in his capacity as a Metro-Dade police officer arrested the plaintiff Hernandez without his consent, probable cause or an arrest warrant. Then immediately after arresting Hernandez Officer Del Mazo instigated the towing away by Dade Wrecker Service of a tow truck belonging to Magnum and driven by Hernandez in the normal course of business.

9. That the defendants caused the plaintiffs' tow truck to be towed away pursuant to a custom and policy on the part of all defendants to tow away vehicles without providing for any post-deprivation hearing within a reasonable time.

10. That at the time the defendant officer caused the vehicle to be towed away be Dade Wrecker Service the tow truck was lawfully situated on private property and it was not an obstruction or hazard to anyone's health or safety.

11. That despite the fact that there were agents of Magnum Towing ready, willing, and able to remove the vehicle the defendants acting in concert, wilfully, wantonly, recklessly, and maliciously seized the plaintiffs' truck and caused it to be towed away off private property against the express wishes and protests of the plaintiffs and without the permission of the property owner, in violation of the Fourth and Fourteenth Amendments to the United States Constitution, Fla. Stat. § 715.07, and Dade County Code § 30-384.

12. That despite demands to release the vehicle the defendants refused to do so without payment in full for towing, accrued storage and a $15.00 illegal service fee for processing a notice to owner pursuant to Fla. Stat. § 713.78 (1986).

13. That the plaintiffs have been deprived of their rights under the Fourteenth Amendment since the defendants have not provided for any means of obtaining a meaningful post-deprivation hearing within a reasonable time (48 hours) following the seizure of the plaintiffs' vehicle.

14. That as a direct result of the seizure of the vehicle and the refusal of the defendants to release said vehicle the plaintiffs have suffered monetary losses since they are no longer able to use said vehicle in their business of *lawfully towing vehicles*.

WHEREFORE, the plaintiffs demand the following relief:

1. That this court declare the defendants' actions illegal and in violation of the Fourth and Fourteenth amendments to the United States Constitution and the applicable provisions of the Florida Constitution.

2. That the court award compensatory and punitive damages against the defendants for their outrageous conduct in taking and refusing to return the plaintiffs' vehicle and for all lost income resulting from the illegal seizure and refusal to return the truck.

3. That this court declare the service charge for filing the notice to owner pursuant to Fla. Stat. § 713.78 illegal and order that the defendants refund all moneys posted as bond with the Clerk of the Court to the Plaintiffs.

4. That this court declare the five (5) day time limit for filing a lawsuit to determine the legality of the towing pursuant to Fla. Stat. § 713.78 illegal in that it constitutes a statute of limitations that is so short as to violate due process of law.

5. That the court declare Fla. Stat. § 713.78 and Dade County Code § 30-384 unconstitutional in part in that neither the statute nor the ordinance provides for a prompt post-seizure hearing to determine the legality of the tow.

6. For such other and further relief as this court deems just and proper.

* * *

APPENDIX D

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MAGNUM TOWING, INC. and RENALDO HERNANDEZ,

Plaintiffs,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC.d/b/a Dade Wrecker Service,

Defendants.

_____/

GENERAL JURISDICTION DIVISION

CASE NO. 87-11503 (15)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT PURSUANT TO FLA. R. CIV. P. 1.510

The plaintiffs, MAGNUM TOWING, INC. and RENALDO HERNANDEZ, pursuant to Fla. R. Civ. P. 1.510, hereby move for summary judgment on the issues raised in the request for declaratory relief as well as on the issues of liability, to wit: whether the plaintiffs' vehicle was lawfully towed off private property; whether the actions of the towing company, a private entity, were "under color of state law" for purposes of 42 U.S.C. § 1983; whether the seizure of the tow truck was in violation of the Fourth Amendment; and whether, under the circumstances of this case, the plaintiffs were deprived of their property without due process of law. The

undisputed facts upon which the plaintiffs rely in support of their motion for summary judgment are as follows:

1. That the plaintiffs were the owners and operators of a tow truck that was towed off private property on March 10, 1987.

2. That the tow truck was seized and towed by defendant Dollar Enterprises, Inc. [hereinafter DOLLAR] pursuant to the directions of defendant, OFFICER DEL MAZO, subsequent to the arrest of the operator of the tow truck, RENALDO HERNANDEZ for the offenses of obstructing a police officer and disorderly conduct. HERNANDEZ was found not guilty of obstruction but guilty of disorderly conduct – that decision is being appealed by HERNANDEZ.

3. That prior to ordering the tow truck removed DEL MAZO failed to offer the operator of the tow truck, HERNANDEZ, any reasonable opportunity to have someone from MAGNUM TOWING, INC come to the scene in order to remove the tow truck. (See Exh. 5, Depo. Ofc. Del Mazo at 20, 22).

4. That DEL MAZO was not the owner or authorized agent of the private property owner at the time that he ordered the plaintiffs' tow truck removed. (See Exh. 8, § 715.07, Fla. Stat.).

5. That the removal and towing of the tow truck from private property, without permission of the property or vehicle owner, constituted an unreasonable seizure of the plaintiffs' property in violation of the Fourth

Amendment as well as § 715.07, Fla. Stat. (1987), and Dade County Code 30-384. (Exh. 9).

6. That DEL MAZO was acting under color of state law at the time that he ordered DOLLAR to remove the tow truck.

7. That DOLLAR was acting in concert with DEL MAZO when it removed and towed the plaintiffs' vehicle.

8. That DOLLAR was acting under color of state law when it removed the tow truck in that it was acting under the direction and control of a state actor, DEL MAZO, and pursuant to a contract entered into between DOLLAR and DADE COUNTY, whereby DOLLAR agreed to remove, tow, and store vehicles at the request of law enforcement officers. (Exh. 6, Contract).

9. That the seizure of the tow truck was in violation of due process of law in that no adequate post-deprivation hearing is provided by the statute governing the seizure of vehicles by police officers, § 713.78, Fla. Stat. (1987). (Exh. 7).

10. That subsequent to the removal of the tow truck the plaintiffs demanded that DOLLAR release the vehicle in that DOLLAR did not have a valid lien on the tow truck since it was wrongfully towed off private property in violation of § 715.07, Fla. Stat. as well as Dade County Code § 30-384. (See Exhibit 4, Letter from MAGNUM). DOLLAR refused to release the vehicle unless all towing and storage charges were paid in cash.

11. That on March 11, 1987 defendant DOLLAR mailed the plaintiffs a claim of lien notice, a copy of which is attached hereto as Exhibit 1.

12. That DOLLAR provided a receipt to MAGNUM upon release of the vehicle by DOLLAR on March 16, 1987, a copy of which is attached hereto as Exhibit 2.

13. That the plaintiffs filed this action and then attempted to secure a bond pursuant to § 713.78, Fla. Stat., in order to secure the release of their vehicle. However, the clerk of the court refused to issue the bond on the grounds that the statute requires that the action be filed in County Court, not in Circuit Court. Faced with no other alternative the plaintiffs filed a second action in County Court in order to be able to secure a bond for the release of their vehicle.

14. That the plaintiffs had to pay $189.00 to the clerk of the court to secure a bond in order to have the tow truck released by DOLLAR. A copy of the clerk's receipt is attached hereto as Exhibit 3.

15. That in addition to the above expenses the plaintiffs had to pay $21.00 to the clerk of the court for the filing fee and another $12.25 to the sheriff to have the summons and complaint served on DOLLAR. (See Receipt, Exh. 3).

16. That the issues to be determined on summary judgment are:

> (a) whether or not the removal of the tow truck from private property without the consent of the vehicle or property owner constituted an unreasonable seizure in violation of the Fourth

Amendment as well as an illegal seizure under § 715.07, Fla. Stat.

(b) Whether DOLLAR was acting under color of state law when it seized the plaintiffs' vehicle, thereby subjecting it to liability under 42 U.S.C. § 1983.

(c) Whether or not a plaintiff can pursue a § 1983 action in state court.

(d) Whether a plaintiff can bring a § 1983 action based partially on a denial of due process of law, when as here the deprivation has occurred pursuant to state law, namely § 713.78, Fla. Stat., when the plaintiff alleges and proves that the remedy and procedures provided in the statute are inadequate in that no meaningful post-deprivation remedy is provided.

(e) Whether the availability of an adequate post-deprivation remedy affects the right to bring a § 1983 action based on a deprivation of a substantive constitutional right such as the Fourth Amendment.

(f) Whether or not the law involving the towing of vehicles subsequent to an arrest was clearly established and whether or not DEL MAZO and DOLLAR are entitled to a "good faith" or "qualified immunity" defense.

(g) Whether the five (5) day statute of limitations provided in § 713.78, Fla. Stat., for the commencing of an action to determine legality of a seizure is in violation of due process as well as the equal protection clause.

(h) Whether the plaintiffs were entitled to a hearing within a reasonable time following the seizure of their vehicle.

(i) Whether § 713.78, Fla. Stat., and Dade County Code § 30-384 are unconstitutional in part in

that they establish a state procedure that fails to provide for any meaningful post-deprivation hearing in violation of the Due Process Clause of the Fourteenth Amendment.

(j) Whether the notice requirements contained in § 768.28, Fla. State., are applicable in § 1983 and § 713.78 actions and if so, whether that in and of itself, is a denial of due process of law as well as a denial of equal protection of the law.

WHEREFORE, the plaintiffs respectfully request that the Court grant their motion for partial summary judgment and declare:

(a) That § 713.78, Fla. Stat., and Dade County Code § 30-384 are unconstitutional in part for failing to comport with the Due Process Clause of the Fourteenth Amendment. When the seizure of the vehicle is made under color of state law an opportunity for a prompt post seizure hearing must be provided for in the statute authorizing the seizure. Also, a hearing must be provided prior to any sale of the vehicle pursuant to § 713.78 (5), Fla. Stat., which authorizes the sale of the vehicle after it has been stored for 45 days.

(b) That the seizure of the plaintiffs' tow truck was an unreasonable seizure in violation of the Fourth Amendment as well as an illegal seizure in violation of § 715.07, Fla. Stat., and Dade County Code § 30-384.

(c) That DOLLAR was acting under color of state law when it seized the plaintiffs' tow truck and as such it is liable for damages under § 1983, both for the substantive violation of the plaintiffs' Fourth Amendment rights and for the violation of due process of law by failing to

provide the plaintiffs with a reasonable opportunity to obtain a meaningful post seizure hearing within a reasonable time.

(d) That the five (5) day time limit imposed by § 713.78, Fla. Stat., is unconstitutional in that it is in violation of the due process and equal protection clauses of the United States and Florida Constitutions.

(e) That the fifteen ($15.00) dollar service charge imposed by DOLLAR to process the mailing of the notice to owner pursuant to § 713.78, Fla. Stat., is illegal.

(f) Such other and further relief as this Court deems just and proper.

Dated: April 1, 1988.

LAW OFFICES OF
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By: /s/ Robert M Jasinski
ROBERT M. JASINSKI

APPENDIX E

	IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA
MAGNUM TOWING, INC. and RENALDO HERNANDEZ, Plaintiffs, vs. DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a Dade Wrecker Service, Defendants. _____/	GENERAL JURISDICTION DIVISION CASE NO. 87-11503 (15) AFFIDAVIT OF RENALDO HERNANDEZ IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FLA. BAR #156481

STATE OF FLORIDA)
COUNTY OF DADE) SS.:

Before the undersigned, an officer duly commissioned by the laws of Florida, on this 25th day of April, 1988, personally appeared RENALDO HERNANDEZ, who first duly sworn deposes and says:

1. That I have personal knowledge of the facts attested to herein and I am fully competent to testify.

2. That I am, and I was at all relevant times, a tow truck driver employed by MAGNUM TOWING, INC.

3. That on March 10th, 1987 at approximately 10:00 p.m. I was approached by an OFFICER DEL MAZO who ordered me to release a vehicle that I was about to tow off the private parking lot of the premises known as the Wellington Manor Apartments located at 10835 S.W. 88th Street, Miami, Florida. OFFICER DEL MAZO advised me that I would be arrested and the tow truck would be impounded unless HERNANDEZ released the vehicle.

4. That after being placed under arrest by OFFICER DEL MAZO, I overheard him instruct another officer on the scene to call for a wrecker to tow my tow truck away. That upon hearing this I told OFFICER DEL MAZO that I wanted him to call the dispatcher at MAGNUM TOWING, INC. in order to have someone come out to remove the vehicle. OFFICER DEL MAZO responded that it was too late since the other tow truck was already on the way.

5. That I specifically told OFFICER DEL MAZO that I did not want anyone to remove the tow truck prior to the arrival of the DADE WRECKER SERVICE tow truck.

6. That my tow truck was equipped with a mobile radio that was in good working order. Nothing prevented OFFICER DEL MAZO from using that radio to call the base in order to make arrangements with MAGNUM TOWING, INC. for the removal of the tow truck.

7. That prior to arresting me OFFICER DEL MAZO used my radio to speak with AMADO G. LOPEZ. Mr. LOPEZ advised OFFICER DEL MAZO that he was a manager of MAGNUM TOWING, INC. and that he was coming out to the scene.

8. That prior to ordering the tow truck removed OFFICER DEL MAZO asked me to sign a form which he said I must sign if I didn't want the tow truck towed away. I refused to sign the form for two reasons. First, it was written in English and I was not sure what it said. Second, I told OFFICER DEL MAZO that I did not want to leave the vehicle but that I wanted him to call MAGNUM TOWING, INC. in order to make arrangements to have someone come out to retrieve the tow truck. When I refused to sign the form OFFICER DEL MAZO instructed another officer to call for a wrecker. Further Affiant Sayeth Naught.

/s/ Renaldo Hernandez
RENALDO HERNANDEZ

Sworn to and subscribed before me this 25th day of April, 1988.

/s/ Doris Lowers
NOTARY PUBLIC

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP. APR. 1, 1990
BONDED THRU GENERAL INS. UND.

APPENDIX F

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

MAGNUM TOWING, INC. and RENALDO HERNANDEZ,

Plaintiffs,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a Dade Wrecker Service,

Defendants.

_____/

GENERAL JURISDICTION DIVISION

CASE NO. 87-11503 (15)

AFFIDAVIT OF AMADO G. LOPEZ IN SUPPORT OF THE PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

STATE OF FLORIDA)
) SS.:
COUNTY OF DADE)

Before the undersigned, an officer duly commissioned by the laws of Florida, on this 20th day of April, 1988, personally appeared AMADO G. LOPEZ, who first duly sworn deposes and say:

1. That I have personal knowledge of the facts attested to herein and I am fully competent to testify.

2. That I am, and I was at all relevant times, one of the owners and managers of MAGNUM TOWING, INC.

3. That on March 10th, 1987 at approximately 10:00 p.m. I received a call over my mobile radio from one of my tow truck drivers, RENALDO HERNANDEZ, who informed me that an OFFICER DEL MAZO had ordered him to release a vehicle that he was about to tow off the private parking lot of the premises known as the Wellington Manor Apartments located at 10835 S.W. 88th Street, Miami, Florida. The driver also informed me that OFFICER DEL MAZO had advised him that he would be arrested and the tow truck would be impounded unless HERNANDEZ released the vehicle.

4. That I instructed my driver not to release the vehicle since this was a civil matter. That I advised my driver that he had the right to remove the vehicle unless the owner was willing to pay a "drop charge" (one-half of the normal towing rate).

5. That I also spoke with OFFICER DEL MAZO, who was speaking on HERNANDEZ's tow truck mobile radio and I advised him that we were not going to release the vehicle and that I would be out at the scene as soon as possible.

6. That I arrived on the scene at approximately 10:15 p.m. and noted that a DADE WRECKER SERVICE tow truck had the tow truck operated by HERNANDEZ and owned by MAGNUM TOWING, INC. hooked up in preparation for lifting the front end of tow truck off the ground so that it could be towed off the parking lot of the Wellington Manor Apartments which is private property.

7. That I immediately approached the driver of the DADE WRECKER SERVICE tow truck, who was operating the controls at the rear of his tow truck, and advised

him that I wanted to pay a "drop charge" in order to have HERNANDEZ's tow truck released to me so that I could remove it from the scene and put it back in service.

8. That I was advised by the Dade Wrecker Service driver I would have to discuss the matter with OFFICER DEL MAZO.

9. That OFFICER DEL MAZO advised me that I would have to go to the auto pound to pick up the tow truck and that I could not get the tow truck back on the scene since it was already hooked up.

10. That I went to the business premises of DADE WRECKER SERVICE at approximately 11:00 p.m. that evening to obtain the release of the tow truck whereupon I was advised that the business was closed and that I would have to return the next day in order to obtain the release of the vehicle.

11. That the picture attached hereto as Exhibit "1" is a true and accurate picture of the tow truck operated by HERNANDEZ and owned by MAGNUM TOWING, INC. as it appeared on March 10, 1987.

12. That the picture attached hereto as Exhibit "2" is a true and accurate picture of the front seat and mobile radio in the aforementioned tow truck as it appeared on March 10, 1987.

/s/ Amado G. Lopez
AMADO G. LOPEZ

Sworn to and subscribed before me this 20th day of April, 1988.

/s/ Doris Lowers
NOTARY PUBLIC

APPENDIX G

IN THE COUNTY
COURT OF THE 11TH
JUDICIAL CIRCUIT IN
AND FOR DATE
COUNTY, FLORIDA

CRIMINAL DIVISION -
MISDEMEANOR

CASE NO. 87-57644

STATE OF FLORIDA,
Plaintiff,

vs.

RENALDO HERNANDEZ,

Defendant.

_____/

1351 N.W. 12th Street
Miami, Florida 33125
Thursday, April 30, 1987
10:10 a.m.

EXCERPT FROM

DEPOSITION

OF

OSCAR DELMAZO, JR.

Taken Pursuant to Notice of Taking Deposition.

* * *

(p. 17) Q Did you have any conversation with the defendant in this case with reference to the towing of the tow truck off the property?

A I don't understand your question.

Q After you arrested the defendant in this case, did you cause his tow truck to be removed from the property?

A Yes, I did.

Q Did you have any discussions with the defendant with reference to removal of that tow truck from the property?

A Yes.

Q What were those discussions?

A I gave him the opportunity to sign a release, a waiver of release, which is standard procedure if we are not going to tow.

Q What was his response?

(p. 18) A He refused.

Q Is that form in English or Spanish?

A The form?

Q Yes.

A I believe it is just in English, but I translated the form and advised him what it was.

Q Did he at any time give you permission to remove that vehicle from the private property?

A No, he didn't give me any permission.

Q Did anyone come from the towing company and offer to remove that vehicle?

A To me personally?

Q Yes.

A No.

Q How about to any of the other officers prior to the tow? Are you aware of the fact that a representative from Magnum Towing came in order to secure the –

A He came when the vehicle was en route to the pound. It was already hooked up by Dade Wrecker.

I had no conversation with him. He talked to the Dade Wrecker driver about that. Once they are hooked up, I have nothing to do (p. 19) with it.

As we were leaving or en route to be leaving is when they pulled up.

Q That form that you spoke of, the release form, isn't that a form that is filled out when a person is going to leave their property unattended?

A That's correct. That's why I offered it to him. There was nobody on the scene at the time, so I offered him the option of signing it and leaving the truck on the scene.

Q Did you offer him the option or opportunity to use his radio to call his base, to have somebody come and remove the tow truck?

A I don't recall. I don't think I did. He was already placed under arrest.

Q Were you aware of the fact that the tow truck had a radio?

A No, I wasn't aware.

Q Isn't it customary, based upon your knowledge, that most tow trucks have radios in them?

A I couldn't answer that. I have no idea what most trucks have in them.

(p. 20) Q Would it be fair to say that to the best of your knowledge, the defendant in this case was never afforded an opportunity to have someone else come and remove that tow truck?

A That's totally incorrect. I don't agree with that at all.

Q Explain to me exactly how the defendant was afforded an opportunity to have someone else come and remove that vehicle.

A My answer to that would be, how did Magnum Towing arrive? How did their partners arrive then if he wasn't given the opportunity?

Q Well, you can ask that question when you are asking the questions. But right now, I want to know, to the best of your knowledge, was the defendant in this case ever afforded an opportunity to have someone else come and remove the vehicle?

A To have someone else come and remove the vehicle? No.

Q We can only assume that somebody must have notified Magnum Towing that the vehicle or the driver had a problem.

A I don't know.

Q So we don't know exactly what it was (p. 21) that the person or the representative from Magnum Towing was responding to when he appeared on the scene, is that correct? In other words, he could have been responding to the fact that his driver was having an altercation as opposed to the fact that the truck was being towed, is that correct?

A It's possible. I don't know.

Q You didn't observe Mr. Hernandez, the defendant in this case, use his radio to call the base?

A He might have used the radio. I just don't recall at this time.

I don't have any recollection of a radio, but I am not saying he didn't have one. I don't know.

Q Are you the person that requested the removal of this tow truck?

A Yes.

Q Didn't you look in the inside of the truck to do an inventory, to make certain that nothing was taken?

A I believe my partner did that, or one of the officers, because we did find a weapon inside the vehicle.

(p. 22) Q Would it be fair to say then that if you searched it extensively enough to find a weapon, you would have found the radio too?

A Yes, but as I said, I don't recall a radio. He might have had one, but I just don't recall it.

Q You had a radio in your car, is that correct?

A Yes.

Q Is there anything that prevented you from calling Magnum Towing to have someone come out and remove the tow truck?

A No.

Q Why didn't you have the tow truck removed?

A As I stated, I gave him the opportunity to sign the waiver of release, which he refused. Therefore, I towed his vehicle, which is pursuant to an arrest.

Q At that time, did you realize that there was a county ordinance that governed the removal of a vehicle by a police officer when they are being impounded?

A I don't understand. I'm sorry.

Q Were you aware as part of your training (p. 23) that there was a county ordinance which gave police officers the right to have vehicles removed after filing an arrest?

A Sure.

Q Was it your understanding that that ordinance also covered the removal of vehicles from private property?

A It covers the removal of vehicles from any property if there is an arrest made and the person refuses to sign the waiver.

Q Have you read that ordinance lately?

A Not lately.

Q Are you aware of the fact that the ordinance only speaks in terms of removing vehicles following an arrest, when a vehicle is on a public street, a viaduct or a bridge?

A No, that's not correct, to my knowledge.

MR. JASINSKI: That's all I have.

MR. ALLEN: You generally don't waive, do you?

THE WITNESS: No, I read.

(Thereupon, the deposition was concluded at 10:30 a.m.)

* * *

APPENDIX H

Sec. 30-384. Impounding vehicles.

(a) A police officer is authorized to remove a vehicle to the nearest garage or other place of safety, or to a garage designated or maintained by the county or by a municipality under the circumstances hereinafter enumerated:

(1) When any vehicle is left unattended upon any bridge, causeway, or viaduct, or where such vehicle constituted an obstruction to traffic.

(2) When a vehicle upon a street is so disabled as to constitute an obstruction to traffic, or the person or persons in charge of the vehicle are by reason of physical injury incapacitated to such an extent as to be unable to provide for its custody and removal.

(3) When a vehicle is found upon the streets and is not in proper condition to be driven.

(4) When any vehicle is left unattended upon a street and is so parked illegally as to constitute a definite hazard or obstruction to the normal movement of traffic.

(5) Where such vehicle has been parked or stored on the public right-of-way for a period exceeding forty-eight (48) hours, in other than designated parking areas, and is within thirty (30) feet of the pavement edge.

(6) When the driver of such vehicle is taken into custody by a law enforcement officer and such vehicle would thereby be left unattended upon a street; provided, however, that the officer shall, prior to impounding a

vehicle, afford the owner or the driver at his or her option, a reasonable opportunity in light of the circumstances in which to provide for the removal of the vehicle within a reasonable length of time. In lieu of impounding the vehicle in cases where neither the driver nor the owner elects to provide for the removal of the vehicle or in cases where neither the driver nor the owner can provide for the removal of the vehicle within a reasonable length of time, the owner or the driver may elect in writing to allow the vehicle to remain in place, if lawful. Neither the individual officer nor the officer's employer shall be held liable for any damage whatsoever to a vehicle when the owner of said vehicle or the driver has elected to allow the vehicle not to be removed.

Prior to impounding such vehicle pursuant to this subsection, the police officer shall reasonably attempt to inform the owner or the driver of said vehicle of the various alternatives to impounding, and, the officer, upon request, shall provide the owner or the driver with the requisite form upon which he or she may elect to allow the vehicle to remain in place.

For purposes of this subsection, the driver of the vehicle shall be conclusively presumed to be the authorized agent of the owner.

(7) When removal is necessary in the interest of public safety because of fire, flood, storm, or other emergency reason.

(8) When a vehicle is left unattended in violation of section 30-447 of this Code or Section 316.1956(3), Florida Statutes.

(b) Any violator taken into custody pursuant to this section may at the discretion of the metropolitan [county] judges be released without posting bond, if the violator agrees to the impounding in a garage authorized by this chapter of the vehicle owned and driven by the violator or to surrender of his or her driver's license to insure the violator's appearance in the metropolitan [county] court to answer the charges against same, and pay such fine as may be assessed against the violator.

(c) No vehicle impounded in a garage as herein provided shall be released therefrom until the charges for towing such vehicle into the garage and storage charges have been paid. Charges for towing and removal shall be fixed by and posted for public inspection in the office of the Metro-Dade police and in the garages affected.

(d) Whenever an officer removes a vehicle from a street as authorized in this section, and the officer knows or is able to ascertain the name and address of the owner thereof, such officer shall within twenty-four (24) hours give or cause to be given notice in writing to such owner of the fact of such removal, and the reasons therefor, and of the place to which such vehicle has been removed. In the event such vehicle is stored in an authorized garage, a copy of such notice shall be given to the proprietor of such garage.

(e) whenever an officer removes a vehicle from a street under this section, and does not know and is not able to ascertain the name of the owner, or for any other reason is unable to give the notice to the owner as hereinbefore provided, and in the event the vehicle is not returned to the owner within a period of three (3) days,

then and in that event the officer shall immediately send or cause to be sent written report of such removal by mail to the motor vehicle commissioner of the state department of public safety and shall file a copy of such notice with the proprietor of any garage in which the vehicle may be stored. Such notice shall include a complete description of the vehicle, the date, time, and place from which removed, the reasons for such removal and the name of the garage or place where the vehicle is stored (Ord. No. 71-94, § 1, 12-21-71; Ord. No. 74-56 §§ 1, 2, 7-2-74; Ord. No. 83-22, § 2 5-3-83)

Cross references – Abandoned motor vehicle, § 30-389; immobilization of certain motor vehicles, § 30-389.4.

APPENDIX I

713.78 Liens for recovering, towing, or storing vehicles. –

(1) For the purposes of this section, "vehicle" means any mobile item, whether motorized or not, which is mounted on wheels.

(2) Whenever a person regularly engaged in the business of transporting vehicles by wrecker, tow truck, or car carrier recovers, removes, or stores a vehicle upon instructions from:

(a) The owner thereof; or

(b) The owner or lessor, or a person authorized by the owner or lessor, of property on which such vehicle is wrongfully parked, and such removal is done in compliance with § 715.07; or

(c) Any law enforcement agency,

he shall have a lien on such vehicle for a reasonable towing fee and for a reasonable storage fee; except that no storage fee shall be charged if such vehicle is stored for less than 6 hours.

(3)(a) Any person regularly engaged in the business of recovering, towing, or storing vehicles who comes into possession of a vehicle pursuant to subsection (2), and who claims a lien for recovery, towing, or storage services, shall give notice to the registered owner and to all persons claiming a lien thereon, as disclosed by the records in the Department of Highway Safety and Motor Vehicles or of a corresponding agency in any other state.

(b) Notice by registered or certified mail shall be sent to the registered owner and to all persons claiming a lien within 14 days of the

date of possession. It shall state the fact of possession of the vehicle, that a lien as provided in subsection (2) is claimed, that the lien is subject to enforcement pursuant to law, and that the owner or lienholder, if any, has the right to a hearing as set forth in subsection (4).

(4)(a) The owner of a vehicle removed pursuant to the provisions of subsection (2), or any person claiming a lien, other than the towing-storage operator, within 5 days of the time he has knowledge of the location of said vehicle, may file a complaint in the county court of the county in which the vehicle is stored or in which the owner resides to determine if his property was wrongfully taken or withheld from him.

(b) Upon filing of a complaint, an owner or lienholder may have his vehicle released upon posting with the court a cash or surety bond or other adequate security equal to the amount of the charges for towing or storage to ensure the payment of such charges in the event he does not prevail. At the time of such release, after reasonable inspection, he shall give a receipt to the towing-storage company reciting any claims he has for loss or damage to the vehicle or the contents thereof.

(c) Upon determination of the respective rights of the parties by the court:

1. Should the owner or lienholder prevail, he may collect damages and costs from the party instigating the tow.

2. Should the person instigating the tow prevail, he shall recover his costs.

3. In any event, the final order shall provide for immediate payment in full of recovery, towing, and storage fees by the vehicle owner or lienholder; or the agency ordering the tow; or the owner, lessor, or agent thereof of the property from which the vehicle was removed.

(5) Any vehicle which is stored pursuant to subsection (2) and which remains unclaimed, or for which reasonable towing or storing charges remain unpaid, may be sold by the owner or operator of the storage space after 45 days from the time the vehicle is stored therein. The sale shall be at public auction for cash. Notice of the sale shall be given to the person in whose name the vehicle is registered and to all persons claiming a lien on the vehicle as shown on the records of the Department of Highway Safety and Motor Vehicles or of the corresponding agency in any other state. Notice shall be sent by registered or certified mail to the owner of the vehicle and the person having the recorded lien on the vehicle at the address shown on the records of the registering agency and shall be mailed not less than 15 days before the date of the sale. After diligent search and inquiry, if the name and address of the registered owner or the owner of the recorded lien cannot be ascertained, the requirements of notice by mail may be dispensed with. In addition to the notice by mail, public notice of the time and place of sale shall be made by publishing a notice thereof one time, at least 10 days prior to the date of the sale, in a newspaper of general circulation in the county in which the sale is to be held or by notices posted for 10 days in three public places in the county, one of which shall be at the courthouse, and another in some conspicuous part of the storehouse. The proceeds of the sale, after payment of

reasonable towing and storage charges and costs of the sale, shall be deposited with the clerk of the circuit court for the county if the owner is absent, and the clerk shall hold such proceeds subject to the claim of the person legally entitled thereto. The clerk shall be entitled to receive 5 percent of such proceeds for the care and disbursement thereof. The certificate of title issued under this law shall be discharged of all liens except those registered with the Department of Highway Safety and Motor Vehicles.

(6) No person regularly engaged in the business of recovering, towing, or storing vehicles shall be liable for damages connected with such services, provided that they have been performed with reasonable care and provided, further, that, in the case of removal of a vehicle upon the request of a person purporting, and reasonably appearing, to be the owner or lessor, or a person authorized by the owner or lessor, of the property from which such vehicle is removed, such removal has been done in compliance with § 715.07. No person regularly engaged in the business of recovering, towing, or storing vehicles shall operate a wrecker, tow truck, or car carrier unless the name, address, and telephone number of the company performing such service is clearly printed on the side of its vehicle.

History. – § 2, ch. 76-82, § 1, ch. 79-206, § 1, ch. 79-244, § 1, ch. 79-410.

89-1513

FILED
APR 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

in the Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the Metro-Dade Police Department, and DOLLAR ENTERPRISES, INC. d/b/a Dade Wrecker Service,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

SUMMARY OF ARGUMENT

REASONS FOR DENYING CERTIORARI

All Respondents in this cause are immune from suits brought pursuant to 42 U.S.C. §1983 in state courts. Respondent Dade County enjoys common law sovereign immunity from such suits as a political subdivision of the

State of Florida. Respondent Officer Oscar Del Mazo enjoys qualified immunity from such suits under the holding of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 1683, 40 L.Ed.2d 396 (1982). Respondent Dollar Enterprises Inc. enjoys both common law sovereign immunity as a "state actor" and qualified immunity pursuant to the holdings of *Sutton v. City of Milwaukee*, 521 F.Supp. 733 (E.D. Wis. 1981) and *Huemmer v. Mayor and City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980).

Petitioners' first question presented is inapplicable to the facts of this case in that no Fourth Amendment rights were brought into issue by the mere impoundment of Petitioners' vehicle without any gathering of criminal evidence. Petitioners' Fourth Amendment claim is therefore without merit.

Petitioners' Fourteenth Amendment procedural due process claim is similarly without merit because there was no true "deprivation" of property under the facts of this case.

ARGUMENT

I

RESPONDENTS ARE IMMUNE FROM SUIT BROUGHT IN STATE COURT UNDER 42 U.S.C. §1983

A. Dade County. The Florida Supreme Court has held that the State of Florida and its agencies (including Dade County, a political subdivision of the state) are immune from suits brought under section 1983 in state court. *Hill v. Department of Corrections*, 513 So.2d 129, 133 (Fla. 1987), *citing Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986) and *Shinholster v. Graham*, 527 F.Supp. 1318 (N.D. Fla. 1981). See also *Spooner v. Department of Corrections*, 514 So.2d 261 (Fla. 5th DCA 1989). Accordingly, and simply, Respondent Dade County, pursuant to its immunity as set

forth in *Hill*, was fully entitled to the judgment granted below.

B. Officer Oscar Del Mazo. Respondent Officer Oscar Del Mazo (Del Mazo) of the Metro-Dade Police Department was also immune from section 1983 liability under the circumstances of this case. Police officers are entitled to qualified immunity from liability under section 1983 unless they violate a clearly established constitutional or federal statutory right of which they knew or should have known at the time of the alleged acts. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 1683, 40 L.Ed.2d 396 (1982). Thus, under the facts of this case, Del Mazo was entitled to immunity unless he knew or should have known that Respondents had a clearly established Constitutional right to be offered alternatives to impoundment because of the existence of a County ordinance allegedly mandating the offering of such alternatives.

It is patently obvious that Respondents had no such clearly established Constitutional right. In *State v. Smith*, 529 So.2d 1226 (Fla. 3d DCA 1988), the Third District Court held that Dade County police officers are not required to offer any alternatives to impoundment of a vehicle, notwithstanding the alleged requirement of Dade County Code section 30-384 that such alternatives be offered. Further, Petitioners themselves argue that the decision in *Colorado v. Bertine*, 479 U.S. 367 (1987), has "caused confusion over whether an 'alternative to impoundment' must be offered when police are not following standardized criteria." (See Petition for Writ of Certiorari, p.7.) Because there was no "clearly established Constitutional right", there was no exception to Del Mazo's qualified immunity, and Del Mazo was entitled to the judgment granted below.

C. Dollar Enterprises, Inc. Respondent Dollar Enterprises, Inc. (Dollar), was likewise immune from section

1983 liability.[1] As set forth above, the State of Florida and its subdivisions have sovereign immunity from section 1983 suits brought in state court. *Hill*, 513 So.2d at 133. Since petitioners argued below that Dollar was a "state actor" for section 1983 purposes (See Petition for Writ of Certiorari, Appendix D), Dollar was immune from section 1983 suits in the state court as well.

In addition, a private towing operator is not liable for section 1983 damages where (a) its role is limited to towing, and not decision making, *Sutton v. City of Milwaukee*, 521 F.Supp. 733 (E.D. Wis. 1981), or (b) when it acts pursuant to a "regularly adopted" ordinance which it has no reason to believe is invalid. *Huemmer v. Mayor and City Council of Ocean City*, 632 F.2d 371 (4th Cir. 1980) (summary judgment in favor of private towing operator is proper even if the activity was state action). Dollar, therefore, like the other Respondents, was entitled to the judgment granted below.

D. Summation: Certiorari Inappropriate. For the foregoing reasons, Certiorari is inappropriate in this instance. As to Dade County, the case below was decided pursuant to state sovereign immunity — there is therefore no need to reach the federal issues raised by Petitioners. As to Del Mazo and Dollar, Petitioners have cited nothing to demonstrate that the Third District Court decided the qualified immunity question in any way that conflicts with the decision of another state court, with the decision of a United States Court of Appeals, or with the applicable decisions of this Court. (See Rule 10, 28 USCA S.Ct. Rules.) Accordingly, the Petition for a Writ of Certiorari should be denied.

---

[1]Respondent Dollar Enterprises, Inc. will not be filing a seperate brief in opposition to the Petition as Respondent Dade County has indemnified Respondent Dollar Enterprises, Inc.

II

THE FOURTH AMENDMENT IS NOT IMPLICATED IN THIS CASE

Respondents argued to the Third District Court, and repeat their argument here, that this case does not involve Fourth Amendment rights. Petitioner Renaldo Hernandez (Hernandez) is not contesting the validity of his arrest. Although the towing of a vehicle may be a seizure within the meaning of the Fourth Amendment under certain circumstances, that amendment is implicated only when the seizure results in the discovery of criminal evidence. The factual situation of the instant case is not what the drafters of the Fourth Amendment were concerned with; indeed, the entire amendment, when read in its full context, makes clear that "seizure" refers to items taken pursuant to a search. The Fourth Amendment is simply not relevant to the present case.

It is not surprising, therefore, that Petitioners cite no cases whatsoever to support the proposition that the mere impoundment of a vehicle subsequent to a driver's arrest, without obtaining criminal evidence to be used against the driver, constitutes an "unreasonable seizure" within the meaning of the Fourth Amendment. The one case relied upon by Petitioners in making their "Fourth Amendment" argument, *Colorado v. Bertine*, 479 U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), is concerned only with the admissibility of evidence discovered during an inventory search of Bertine's vehicle. In fact, the section of *Bertine* quoted by Petitioners on page 9 of their Petition is quoted completely out of context. The full quotation in context reads as follows:

> Bertine finally argues that the **inventory search** of his van was unconstitutional because departmental regulations gave the police discretion to choose between impounding his van and parking

> and locking it in a public parking place. The Supreme Court of Colorado did not rely on this argument in reaching its conclusion, and we reject it. Nothing in Opperman or Lafayette prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of something other than **suspicion of evidence of criminal activity.** Here, the discretion afforded the Boulder police was exercised in light of standardized criteria, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to **investigate suspected criminal activity.** (Emphasis added.)

Colorado v. Bertine, 479 U.S. at 375-76.

There has been no allegation in the instant case that Respondents chose to impound Petitioners' vehicle in order to investigate suspected criminal activity. Petitioners have never alleged an improper search of their vehicle. *Bertine* and its related cases are irrelevant to the factual situation at hand. Petitioners, therefore, have clearly fallen short of showing that the Third District Court decided the "Fourth Amendment question" in a way that conflicts with any other Court, and their Petition should be denied.

III

RESPONDENTS DID NOT VIOLATE PETITIONERS' DUE PROCESS RIGHTS

Initially, as argued by Respondents to the Third District Court, it is obvious that Hernandez had no Fourteenth Amendment claim because he had no ownership interest in the tow truck. Further, as also argued by Respondents to the Third District Court, there was not a true "deprivation" of the tow truck to begin with.

Petitioners were offered the opportunity, and refused, to have their vehicle released by signing an owner/driver release form waiving liability on the part of Dade County for the vehicle if it were left in place. (See Petition for Writ of Certiorari, pp. 3-4.) Petitioner Magnum Towing Inc. (Magnum) could not contend, therefore, that its property was involuntarily taken from it. Any right Magnum may have had to retain possession of its vehicle was waived by its driver's refusal to sign the owner/driver release form.

Petitioners have cited no cases that conflict with a holding that the facts of this case establish no Fourteenth Amendment deprivation. The Petition for a Writ of Certiorari should therefore be denied.

CONCLUSION

For the reasons stated and upon the authorities cited, the Petition for a Writ of Certiorari should be denied.

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CERTIFICATE OF SERVICE

I, Robert A. Ginsburg, a member of the bar of this Court, hereby certify that on the day of April, 1990, three copies of this Brief in Opposition to Petition for a Writ of Certiorari were served by U.S. Mail by depositing same in a U.S. mailbox, with first class postage prepaid, addressed to ROBERT M. JASINSKI, ESQUIRE, at The Roney Plaza, Suite M-8, 2301 Collins Avenue, Miami Beach, FL 33131, attorney for Petitioners and to Andrew L. Salvage, Esquire, One CenTrust Financial Center, 100 S.E. Second Street, Miami, Florida.

_____

Dade County Attorney

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No. 89-1513

In The

Supreme Court of the United States

October Term 1989

MAGNUM TOWING, INC. and
RENALDO HERNANDEZ,

Petitioners,

vs.

DADE COUNTY, OFFICER OSCAR DEL MAZO of the
Metro-Dade Police Department, and
DOLLAR ENTERPRISES, INC. d/b/a
Dade Wrecker Service,

Respondents.

PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

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PETITIONERS' REPLY BRIEF TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE THIRD DISTRICT OF FLORIDA

ARGUMENT

I. THE TRIAL COURT NEVER REACHED THE IMMUNITY ISSUES RAISED BY THE RESPONDENTS IN THEIR BRIEF

The Respondents are incorrect in their assertion that "[a]s to Dade County, the case below was decided pursuant to state sovereign immunity – there is therefore no need to reach the federal issues raised by Petitioners." Resp. Brief in Opp. at 4.

In its order granting final summary judgment the trial court, in compliance with Florida's Declaratory Judgment Act, §§ 86.011, Fla. Stat. (1989), et seq., held that the "[d]efendants' actions did not violate the Fourth or the Fourteenth Amendments. . . ." Pet. Cert., Final Summary Judgment, Appendix B at App. 2. Having found that the Respondents violated no constitutional rights, statutes, or ordinances, the lower court logically concluded that the "Defendants have no liability to Plaintiffs under either 42 U.S.C. § 1983 or Section 715.07 of the Florida Statutes." *Id.* The Third District affirmed, without opinion, the judgment of the trial court. It is patently obvious that neither the trial nor the appellate court considered the immunity issues raised by the Respondents in their brief in opposition.

A. RESPONDENTS ARE NOT IMMUNE FROM SUIT BROUGHT IN STATE COURT UNDER 42 U.S.C. § 1983

(1) Dade County Is Subject To Suit In State Court In A § 1983 Action.

It should be noted from the onset that although the Eleventh Amendment precludes suits against a state in federal court, it has long been recognized that counties and local government entities do not occupy the same position as the state for purposes of the Eleventh Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 123 n. 34 (1984); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 (1979). A lengthy list of circuit decisions rejecting the applicability of the Eleventh Amendment to counties is found in *Crane*

v. State of Texas, 759 F.2d 412, 415-417 (5th Cir. 1985).[1]

This Court has made it clear that the state immunity doctrines do not limit liability in § 1983 actions brought in state courts. In *Martinez v. California*, 444 U.S. 277, 284 n.8 (1980), this Court held that:

> Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. . . .

The same policy is applicable to § 1983 actions filed in state court. *Accord Felder v. Casey*, 487 U.S. 131, 139 (1988) ("[A] state law that immunizes government conduct otherwise subject to suit under § 1983 is pre-empted, even where the federal civil rights litigation takes place in State Court, because the application of the state immunity law would thwart the congressional remedy, . . . which of course already provides certain immunities for state officials.").

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[1] Dade County cites several cases in its Brief at 2 in support of its argument that it is immune from suit brought under § 1983 in state court. *See, e.g., Hill v. Department of Corrections*, 513 So. 2d 129 (Fla. 1987). The cases cited say no more than what this Court recently held in *Will v. Michigan Department of State Police*, 491 U.S. ___, 109 S.Ct. 2304 (1989), that neither a state nor its agencies is a person under § 1983. *Will*, at ___ n. 3, 109 S.Ct., at 2306 n.3.

(2) Del Mazo And Dollar Violated Clearly Established Fourth And Fourteenth Amendment Rights When They Caused The Plaintiffs' Tow Truck To Be Removed From Private Property.

An officer who directs the towing of a vehicle pursuant to an ordinance that does not provide for a prompt postdeprivation hearing, as well as a towing company that acts under his direction and control, can be held accountable in a § 1983 action for violating procedural due process rights. *Soffer v. City of Costa Mesa*, 798 F.2d 361, 364 (9th Cir. 1986); *Stypmann v. City and County of San Francisco*, 557 F.2d 1338 (9th Cir. 1977) (county, officer, and tow company held liable for due process violation); *Goichman v. Rheuban Motors, Inc.*, 82 F.2d 1320, 1322 (9th Cir. 1982) (private towing company acting at behest of police officer in pursuance of statutory scheme acted under color of state law). In *Addante v. Village of Elmwood Park*, 541 F. Supp. 497, 498 (N.D. Ill. 1982) the court held that the towing company, as well as its supervisor, could be held liable under § 1983 for towing vehicles when the local government failed to provide a meaningful postdeprivation hearing. The " . . . question is not who is best equipped to remedy the violation but rather who caused the violation." Intertwined responsibility and activity is what makes private persons "state actors." *Id.* at 499 n. 5. Even a murderer on death row was successful in his suit against a sheriff and wrecker for violating his right to procedural due process. *Coleman v. Turpen*, 697 F.2d 1341 (10th Cir. 1982) (tow company liable for jointly participating in seizure of truck). *See also Lugar v. Edmondson Oil Co.*, 457 U.S 922, 941 (1982), ("a private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment.").

Finally, the Respondents had entered into a contract whereby DOLLAR would tow and impound vehicles at the request of the police thereby rendering it liable pursuant to a "conspiracy theory of liability" (accomplish purpose by unlawful means). DOLLAR is liable for DADE's acts "[b]ecause 'an otherwise private person acts "under color of" state law when engaged in a conspiracy with state officials to deprive another of federal rights. . . .' " *Tower v. Glover*, 467 U.S. 914, 920, 104 S.Ct. 2820, 2824, 81 L.Ed.2d 758 (1984); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1976); *Messick v. Leavins*, 811 F.2d 1439, 1443 (11th Cir. 1987) (due process violation).

II. THE IMPOUNDMENT OF A VEHICLE PURSUANT TO THE COMMUNITY CARETAKING FUNCTION OF THE POLICE IMPLICATES THE FOURTH AMENDMENT

Despite the Respondents' contention to the contrary, Resp. Brief at 5, the decision in this case is contrary to this Court's decision in *Colorado v. Bertine*, 479 U.S. 367 (1987) as well as the universally recognized principle that "[a]bsent a statutory basis justifying impoundment, we look to the totality of the surrounding circumstances to determine the reasonableness of the seizure of the vehicle." *State v. Rice*, 717 P.2d 695, 696 (Utah 1986). *See State v. Perry*, 324 S.E.2d 354, 359 (W. Va. 1984) (collecting cases); *cf. People v. Krezen*, 397 N.W.2d 803, 805 (Mich. 1986) (while noting that there may well be situations in which the impoundment would violate the Fourth Amendment as an unreasonable seizure, the court upheld impoundment, which occurred within the context of a standard departmental policy that, upon arrest of the driver, all vehicles not released to another driver were to be impounded). However,

> in the situation where the owner or possessor of a vehicle has been arrested in or near his car, ordinarily, he must be given a reasonable opportunity to make some alternative disposition of the vehicle before the police may impound it for the sole purpose of protecting it and its contents from theft or damage.

State v. Perry, 324 S.E.2d 354, 359 (W. Va. 1984); *Miller v. State*, 403 So. 2d 1307 (Fla. 1981). *See also United States v. Pappas*, 735 F.2d 1232 (10th Cir. 1984) (impoundment unreasonable in light of the circumstances without first affording operator reasonable opportunity to make alternative arrangements); *United States v. Brown*, 797 F.2d 929, 932 (4th Cir. 1986) (question is whether the police officer's decision to impound was reasonable under the circumstances).

The validity of an impoundment rests on whether the police officer has reasonable cause to impound the vehicle. In this case the arresting officer did not have reasonable cause to impound the Petitioners' tow truck.

III. RESPONDENTS' CONDUCT VIOLATED CLEARLY ESTABLISHED LAW

In order to put this case in its proper perspective one should look at the chronology of the recent decisions addressing the impoundment issue. Prior to this Court's decision in *Bertine* the law was clearly established in Florida, as well as in most other states, that prior to impoundment a reasonable opportunity to provide for alternative arrangements must be afforded to the vehicle operator in order to comply with the reasonableness requirement of the Fourth Amendment. *Miller v. State*, 403 So. 2d 1307 (Fla. 1981). On January 14, 1987 this Court published its opinion in *Bertine* in which the Court held that the Fourth Amendment did not mandate that an

alternative to impoundment must be afforded when police are following standardized procedures. The Petitioners' vehicle was impounded on March 10, 1987, approximately 2 months later. Subsequently, the Third District Court of Appeal on August 8, 1988, in *State v. Smith*, 529 So. 2d 1226 (Fla. 3d DCA 1988), held that the police acted reasonably when they inventoried a rental vehicle without affording the operator any opportunity to provide for its removal. Since the operator was not an authorized driver he was not offered any opportunity to make arrangement for its removal. The **standard procedures** applicable to **rental vehicles** was that the rental car company would be notified to come and get the vehicle. An inventory would be conducted prior to their arrival. The Third District's statement "that *Bertine* obviates the *Miller* requirement that an arrested driver be offered an alternative to impoundment . . . ," *Smith*, at 1231, was dicta – there was no impoundment in *Smith*. Finally, in *Wells v. State*, 539 So. 2d 464 (Fla.), *cert. granted*, 109 S.Ct. 3183 (1989), the Supreme Court of Florida acknowledged that its prior decision in *Miller v. State* was "superseded" by *Bertine* "to the extent of any inconsistency." *Wells*, at 469.

> Under the analysis of *Bertine*, we believe the Patrol is not compelled to provide an alternative to impoundment, as we held in *Miller* and *Sanders*. Thus, we believe the officer in this instance acted reasonably by choosing to impound an automobile containing several thousands dollars in cash rather than leave it unprotected at the roadside.

Id.

The Third District, in *State v. Smith, supra*, went on to opine that Dade County Code § 30-384's requirement that the vehicle operator must be afforded a reasonable opportunity in light of the circumstances to make alternative

arrangements prior to an impoundment was no longer applicable following this Court's decision in *Bertine*. However, the Respondents are hardly in any position to claim that they relied on a decision handed down 17 months subsequent to the incident in question to justify their actions. Regardless, the Third District panel's conclusion that *Bertine* wiped out the need for police to comply with standardized procedures applicable to the impoundment of vehicles was obviously wrong.

Assuming, arguendo, that Dade County Code § 30-384 is no longer applicable the Respondents are in no better position. The decision in *Bertine* did nothing to upset the clearly established law that police, in the absence of any standardized procedures, must afford the vehicle operator a reasonable opportunity, in light of the circumstances, to make alternative arrangements for the removal of the vehicle. *Bertine* made it clear that if standardized procedures exist the police must abide by them. DEL MAZO failed to follow standardized procedures. He also failed to act reasonably. His actions violated clearly established law. He is not entitled to "qualified immunity."

DOLLAR should have been aware that DEL MAZO did not have any right to seize and impound the tow truck. Since it was acting in concert with DEL MAZO it is liable to the same extent as DEL MAZO. It cannot claim that it is entitled to "qualified immunity."

Dade County is not being sued for any Fourth Amendment violation. It is being sued for establishing the policy [Dade County Code § 30-384] which permitted the impoundment, without providing for adequate procedural safeguards.

DOLLAR has raised an interesting issue concerning the applicability of "qualified immunity" to private individuals acting under color of state law. There exists a split among the circuits. The Fifth, Eighth, and Eleventh Circuits permit private parties to raise the defense of "qualified immunity." *Folsom Inv. Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982); *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983; *Jones v. Preuit & Mauldin*, 851 F.2d 1321 (11th Cir. 1988) (en banc), vacated on other grounds, 109 S.Ct. 1105 (1989). The First, Sixth, and Ninth Circuits have refused to allow private parties to raise the immunity defense. *Downs v. Sawtelle*, 574 F.2d 1 (1st Cir. 1978), *cert. denied* 439 U.S. 910 (1978) (private parties could not rely on qualified immunity defense because no policy reasons justified this); *Duncan v. Peck*, 844 F.2d 1261 (6th Cir. 1988) (court joins the First and Ninth Circuits in rejecting immunity for private parties); *Howerton v. Garcia*, 708 F.2d 380 (9th Cir. 1982). This issue has yet to be addressed by this Court.

IV. THE RESPONDENTS VIOLATED THE PETITIONERS' RIGHT TO DUE PROCESS

Respondents argue that "there was not a true 'deprivation' of the tow truck to begin with," Resp. Brief at 6, arguing that the Petitioners "refused, to have their vehicle released. . . ." *Id.* at 7. This is incorrect. HERNANDEZ refused to sign the release form due to the fact that he felt that it would be far more reasonable to notify MAGNUM that he was arrested and that someone should be dispatched to retrieve the vehicle rather than leave it unattended at the scene of the arrest. Dade County Code § 30-384 required that DEL MAZO offer this opportunity to the Respondents. HERNANDEZ's insistence that the

officer follow the law cannot be labeled unreasonable, nor can it be construed as a waiver of any rights.

When owner/manager Lopez arrived on the scene, prior to the removal of the tow truck, he requested that the vehicle be released. The Respondents refused to release the vehicle – even after he offered to pay to have it released. See Lopez Affidavit, Pet. App. F. Contrary to the Respondents' assertion, there was no voluntary relinquishment of possession of the tow truck.

SUMMARY

The decision handed down in this case is in conflict with the decisions of this Court as well as numerous federal appellate and state supreme court decisions. The issues presented in this case concern fundamental constitutional rights.

Certiorari is appropriate in this case in order to remove the conflicts that this case has created and permit the Petitioners to seek redress for the constitutional violations perpetrated by the Respondents. This case presents important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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